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THE PRESIDENT VERSUS THE COMMISSIONER – OR, WHEN IS A DIPLOMAT NOT A DIPLOMAT?

The Facts

On August 27, 2017, Guatemala’s President Jimmy Morales declared Iván Velásquez, commissioner of the UN-created International Commission Against Impunity in Guatemala (CICIG), to be *persona non grata* and ordered him out of the country.

The president’s power to designate as *persona non grata* a foreign person, especially a diplomat, is the customary right of any nation and its head of state. The 1961 Vienna Convention on Diplomatic Relations,³ a treaty which almost every nation on earth has joined, says that the power of declaring *persona non grata* may be invoked at any time, and without explanation.

The Constitution of Guatemala also gives this power to the president of the republic on an exclusive, absolute basis.

Even so, Morales – undoubtedly realizing that this action against the head of the CICIG would raise a firestorm – took special care to state his reasons for it.

According to Morales, Velásquez had meddled in Guatemala’s internal affairs, in violation of the Vienna convention that says the first obligation of diplomats is never to interfere in the business of the host country.

The president asserted that the CICIG commissioner had abused his power on numerous occasions; by illegally putting pressure on Guatemala’s Congress, and by making public accusations against Guatemalan citizens in a manner that violated their rights.

The Agreement Between the United Nations and the State of Guatemala,⁴ in establishing the CICIG, defined its commissioner and all its personnel as diplomats; thereby entitling them to diplomatic protections and benefits as defined by the Vienna convention. The principal benefit was one of immunity; the commissioner and the CICIG staff could not be punished or prosecuted for any of their actions in Guatemala.

The CICIG had invoked diplomatic immunity, at least once, to fend off a charge of murder. On October 28, 2016, the CICIG had staged a raid that ended with the killing of a private citizen in his own home, at an early morning hour when police operations against any residence are forbidden by law.⁵

3.- <http://www.infoleg.gob.ar/wp-content/uploads/2014/12/LeyJ-0584.pdf>

4.- http://www.cicig.org/uploads/documents/mandato/cicig_acuerdo.pdf

5.- See Part 2 of this series, “Murder by Diplomatic Immunity.”

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For that transgression, the CICIG pled diplomatic immunity. As of this writing, the case is still under review; but any judicial verdict against the CICIG is unlikely because, in the *persona non grata* matter, Guatemala's highest court found the CICIG commissioner to be above the president's power and above the nation's law.

The same day as the president's *non grata* order, two third-party individuals petitioned the court to grant relief to Velásquez, who never even had to plead on his own behalf. The court immediately granted a temporary injunction against the president's order⁶, gliding over the fact that the third-party petitions were legally insufficient; by law, only the aggrieved party can file for relief.

Two days later, Guatemala's human-rights ombudsman, Jordán Rodas, filed another injunction request against the *non grata* declaration. The court chose that moment to make its injunction permanent.

But Rodas's part in the matter was not disinterested; he had been identified by the *Associated Press* as having attended the pro-CICIG demonstration that took place after publication of the president's order.⁶ Can one, in good faith, protest as a private citizen and then execute to the same effect as a public official? Only in a context of official corruption.

As it happens, Rodas's injunction request was an act beyond the duties of his office; hence, illegal. In a rule-of-law society, he would have been removed from office and perhaps prosecuted. But since the CICIG is now making law in Guatemala, and since Rodas is on the side of the CICIG, he is showered with honors.

The Fantasy: Sometimes a Diplomat, Sometimes Not

In its decision, the high court raised issues that would kindly be called diversionary; for example, that in creating the CICIG, Guatemala had pledged to enter a dispute-resolution process if any conflict were to arise.

President Morales saw no dispute at all in this matter. The *non grata* decision was his and his alone to make – a matter beyond conflict or dispute. In Anglo-Saxon legal parlance, a president's declaration of *persona non grata* is black-letter law – a rule not subject to argument or debate.

To make the matter immediate, we may look at a recent use of the *persona non grata* statute. On March 15, 2018 British Prime Minister Theresa May ordered the expulsion of 23 Russian

6.- <http://www.latimes.com/world/la-fg-guatemala-un-20170827-story.html>

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diplomats, immediately following a nerve-gas attack in a British city that the British and other governments blamed on Russia.⁷ The Russian government might argue with the contention but could not protest the expulsion, because every sovereign state has the right to expel diplomats with no questions asked.

Except for Guatemala; or so says the country's highest court.

In facing the incontrovertible use of *persona non grata* by Guatemala's president, the magistrates of the Constitutional Court needed to have things both ways. For circumstances that benefited Velásquez's diplomatic standing, they needed him to be a diplomat; while for circumstances like the *non grata* order which made Velásquez's diplomatic standing inconvenient, they needed him to be not a diplomat as well.

The magistrates were crafty enough to avoid putting this idea into words. It would have contradicted the CICIG's founding document, which designates the CICIG's members as diplomats; and it would have denied the visible fact that the CICIG, in other situations, has claimed diplomatic immunity.

Anyway, the high court's reticence paid off. By keeping quiet on this matter, the court allowed Velásquez and the CICIG to be both things at once.

The court's real position was most clearly disclosed in its honoring of the injunction request from the human-rights ombudsman, which portrayed Velásquez as an ordinary citizen whose rights were being trampled by Guatemala's president.

On its face, the court's permanent injunction against Morales was out of order. The affected parties were given no chance to present evidence and arguments; indeed, they could not have had that chance within the two days it took for the court to publish its decision.

On October 10, 2017, the Constitutional Court pronounced the matter closed. The *non grata* order thereby surmounted, Velásquez was able to stay; and stay he did.

The court's decision was politically motivated, consciously illegal, and in clear violation of the right to due process. The CICIG commissioner, whose calling-card is the fight against impunity, knows that he may remain in Guatemala only by virtue of an illegal ruling on his own behalf.

7.- <https://ind.pn/2GNA48g>